

No. 21-1695

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**GORGE DESIGN GROUP LLC and KIRBY
ERDELY,**

Plaintiffs --
Appellees,

v.

MEANING XUANSHENG,

Defendant,

NEOAGIC CORPORATION DBA

WWW.MERCADOMAGICO.COM,

Defendant-
Appellant.

*Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:20-cv-01384*

*The Honorable William S. Stickman, Judge
Presiding*

AMENDED AND CORRECTED MOTION FOR LEAVE TO FILE

Movant, PROFESSOR LORIANNE UPDIKE TOLER, by her counsel,

LAWRENCE A. STEIN, moves, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, for leave to file a brief *amicus curiae* in support of none of the parties. In support of her motion, movant states as follows:

1. Rule 29(a)(2) of the Federal Rules of Appellate Procedure permits the filing of briefs *amicus curiae* with leave of court or if all parties have consented to its filing. Counsel for the appellants have agreed to the filing of the brief. Movant requested consent from counsel appellees, but the appellees' counsel have not responded to that request.

2. The filing of briefs *amicus curiae* will be allowed when (1) a party is not adequately represented or (2) when the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. (*National Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000).)

3. Many original defendants in this case are unrepresented and not participating in this appeal. Though not dismissed from the case below, they each experienced the same procedural irregularities discussed in appellant's briefs including insufficient notice. Thus, parties are inadequately represented in this appeal.

4. Movant has a unique perspective and specific information that can assist the court beyond what the parties can provide. Prof. Updike Toler is a constitutional

scholar and historian. She has a unique knowledge of the sources of the Constitution, having helped to establish two digital constitutional archives, and has published many times over on constitutional history and assisted litigants and scholars with constitutional history in several Supreme Court cases and related issues.

5. The research for the brief will be directed by Prof. Updike Toler with the assistance of legal history students at the law school at Northern Illinois University. The brief will contain in-depth constitutional history research on the Framing understanding of two issues: a) the Patent Clause in light of the Takings Clause and b) the Fifth Amendment's Due Process Clause's notice requirements. This second issue is particularly relevant to the case in light of the Federal Circuit's ruling from last Friday, October 28, 2022, requiring more adequate notice under FRCP 65(a) for similarly-situated "Schedule A" defendants in a preliminary injunction hearing, ensuring their constitutional due process rights were upheld. (*ABC Corp. II v. Unincorporated Associations Identified on Schedule "A,"* No. 21-2150 (Fed. Cir. 2022).) This class assignment will be a wonderful opportunity for students to gain practical experience writing briefs and doing the relevant historical legal research.

7. The research Professor Updike Toler will direct and for inclusion in the brief will help the court better understand the constitutional issues raised by this case in the context of history. This is information which goes well beyond the legal

arguments provided by either party. Further, few law professors—let alone attorneys—are willing or capable of doing the type of research that will be provided in the proposed amicus briefs. In fact, Prof. Updike Toler is uniquely suited to direct the kind of research she proposes to provide.

8. Movant proposes to file her brief on or before December 1, 2022

9. The reason why this amicus brief is desirable, and why the matters asserted are relevant to the disposition of the case, is that several constitutional issues are implicated in the case that are not addressed in the briefs, and because several original defendants are not parties to this appeal.

10. The movant requests permission to file her amicus brief of no more than 7,500-word. The briefs on the merits are relatively voluminous and the material to be proposed to be filed is relatively complex. The appellants' opening brief alone is, according to its certificate of compliance, contains 13,998 words. The following two briefs contain 11,855 words in total, according to their respective certificates of compliance.

11. According to rule 29(a)(6), the brief was due on November 1, 2021. Rule 29(a)(6) permits this court to allow the filing of the brief after it was originally due. Movant was unaware of the existence of this case on November 1, 2022, and acted promptly to file this request after she became aware of it. Movant request leave to file her brief no later than December 1, 2022. Movant suggests that the parties

have until December 15, 2022, to answer, as provide by the rule.

WHEREFORE, movant, PROFFESOR LORIANNE UPDIKE TOLER, requests an order giving her leave to file a brief as amicus curiae by December 1, 2022, no longer than 7,500 words in support of none of the parties, raising appropriate issues to assist the court in adjudicating the issues in this case, and for all other relief deemed appropriate under the circumstances.

Respectfully submitted,

/s/ Lawrence A.

Lawrence A. Stein

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CERTIFICATE OF SERVICE

On November 15, 2022, the foregoing motion and attachments were submitted to the Court electronically, and thereby served on all parties, by the CM/ECF system.

Dated: November 15, 2022

/s/ Lawrence A. Stein

Lawrence A. Stein, Counsel Lorianne
Updike Toler

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitations in Federal Rule of Appellate Procedure 27(d)(2)(A) and Federal Circuit Rule 27(d).

According to the word count feature in Microsoft Word, the motion and supporting papers including this page contain 1,043 words. The motion was prepared in a proportionally spaced typeface using Times New Roman in 14-point size.

Dated: November 15, 2022.

/s/ Lawrence A. Stein

Lawrence A. Stein, Counsel for
Lorianne Updike Toler

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